OAH Docket No. 4-3100-12605-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

**FOR THE DEPARTMENT OF VETERANS AFFAIRS**

Darrell A. Gleason,

Petitioner,

vs.

Murray County,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on Wednesday, June 21, 2000, at the Murray County Courthouse, Slayton, Minnesota. The administrative record closed on July 31, 2000, when the ALJ received the parties' post-hearing memoranda.

Gordon L. Moore III, Attorney at Law, 607 Tenth Avenue, P. O. Box 517, Worthington, Minnesota 56187-0517, appeared at the hearing as attorney for the Petitioner, Darrell A. Gleason. And Paul A. Malone, Murray County Attorney, 2605 Broadway Avenue, P. O. Box 256, Slayton, Minnesota 56172-0256, appeared at the hearing as attorney for the Respondent, Murray County (the County).

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,[1] the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to him. Parties should contact the office of Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to find out how to file exceptions or present argument.

## THE ISSUES

Because of a back injury sustained while working for another employer, the Sheriff reassigned Mr. Gleason from the position of patrol deputy to limited duty as a prisoner transport deputy in October 1993. That reassignment resulted in a reduction in work hours and wages. The Sheriff later stopped giving him prisoner transport assignments in June 1995. That resulted in another substantial reduction in his hours and wages. The Sheriff finally terminated his employment altogether on April 26, 1999. During much of the time Mr. Gleason served as a limited duty deputy, he was receiving workers' compensation benefits from his other employer.

1. Did Mr. Gleason resign from his job as a deputy at any time before April 26, 1999, thereby relieving the County of any earlier obligation to advise him of his veterans preference rights?

2. In October 1993 did the County remove Mr. Gleason from a position within the meaning of the Veterans Preference Act (VPA)?

3. In June 1995 did the County remove Mr. Gleason from a position within the meaning of the VPA?

4. Are VPA rights unavailable to Mr. Gleason because he was only a temporary or occasional worker?

5. Do findings made by a workers' compensation judge in September 1995 conclusively establish that Mr. Gleason resigned his deputy position?

6. Is Mr. Gleason's claim barred by laches?

7. Is Mr. Gleason entitled to reinstatement and back pay? And if so, what amounts may the County offset against its back pay liability?

## SUMMARY

Since Mr. Gleason was a *permanent* part-time deputy sheriff, he is entitled to the protections of the VPA. Because of back problems, Mr. Gleason requested and accepted a demotion from patrol duty to prisoner transport duty in October 1993. He therefore neither resigned nor was removed from his position at that time. But later on July 1, 1995, the Sheriff violated the VPA by further demoting him from that prisoner transport position without his consent. And Mr. Gleason is entitled to reinstatement as of that date. Because his first demotion was voluntary, he is entitled to reinstatement only to the transport position with commensurate back pay. The County may offset from his back pay award by what it has paid him since July 1, 1995, but it may not offset earnings from his other employer or the workers' compensation benefits that he received from that other employer. Finally, Mr. Gleason's claim is barred neither by collateral estoppel nor by laches.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Mr. Gleason resides at 750 First Street, Currie, Minnesota 56123. He is not currently employed.[2] He served on active duty in the United States Marine Corps from March 1, 1966 until February 28, 1968. His active duty service was followed by service in the U. S. Marine Corps Reserve until December 21, 1971, after which he was honorably discharged.[3] Mr. Gleason subsequently served in the National Guard for eighteen months.

2. Murray County is a political subdivision of the state. The personnel practices that apply to most of the County's employees are established by a merit system and personnel procedures adopted by the County Board's Personnel Committee.[4] The Murray County Sheriff is an elected official of the County whose supervision and control over the employees of his office is plenary and not subject to the authority of the County Board.[5] Nevertheless, the Sheriff has traditionally relied on the County Board's personnel procedures for guidance.[6]

3. After being discharged from active duty in the Marine Corps, Mr. Gleason returned to his home in Currie, Minnesota, and started working as a mechanic at an automobile repair business that his father owned and operated there, known as "Ken's Repair."[7]

4. In 1981, while employed by Ken's Repair, Mr. Gleason suffered a back injury that he claimed was work-related.[8] In the same year a laminectomy was performed on his back,[9] and he received workers' compensation benefits for temporary total disability due to that injury from August 1, 1981, through February 1, 1982.[10]

5. During the early 1980s the Murray County Sheriff's office was bringing its patrol cars to Ken's Repair for repair and maintenance, and as a result, Mr. Gleason became acquainted with some of the County's deputy sheriffs.[11] Contact with those deputies stimulated Mr. Gleason's interest in becoming a peace officer. He qualified for and obtained a part-time peace officer's license from the state in 1984, and he has continued to hold that license.[12] When he was first licensed as a peace officer in 1984, one of the licensure standards of the Board of Peace Officer Standards and Training (POST Board) was that:

> [a] licensed physician or surgeon shall make a thorough medical examination of the applicant to determine that the applicant is free from any physical condition which might adversely affect the performance of peace officer duties.[13]

Mr. Gleason met that particular physical standard when he was originally licensed.[14]

6. Mr. Gleason began his career as a part-time peace officer as a police officer for the City of Fulda in late 1984. Sometime between then and March 1987 the Murray County Sheriff's Department began hiring Mr. Gleason during his off-duty hours to provide security at dances.[15] Mr. Gleason expressed an interest to Sheriff Ronald McKenzie in becoming a Murray County deputy sheriff. And on March 24, 1987, Sheriff McKenzie hired him as a part-time deputy.[16] At that time the Department's only other deputy was Brandt Pope, who was a full time peace officer and who became Chief Deputy when Mr. Gleason was hired. Before being hired, Mr. Gleason disclosed his 1981 back injury to the Sheriff's Department, but he indicated that he was no longer experiencing back problems at that time.[17]

7. Under Minnesota Law, a part-time peace officer may not serve on active duty more than an average of 20 hours per week, not including time spent on call when no call to active duty is received, calculated on an annual basis.[18] As a part-time deputy, Mr. Gleason never exceeded that statutory limit on active duty hours. [19] Although the hours that Mr. Gleason spent on active duty with the Murray County Sheriff's Department were irregular, he asked to be assigned as many hours as possible within his annual limitation.[20]

8. As a part-time deputy sheriff, Mr. Gleason was called to active duty on an as-needed basis, such as when Sheriff McKenzie or Chief Deputy Pope became ill or had scheduled vacations, on weekends, and during emergencies or times of special need.[21] There were no limitations on his work assignments. So during a shift he might be engaged in either patrol duty,[22] in transporting prisoners,[23] or in both functions, depending on need.[24] He was frequently assigned the Saturday day patrol shift.[25]

9. Sometime in October 1993 Mr. Gleason told Sheriff McKenzie and Chief Deputy Pope that he had been experiencing back and leg problems while on duty. He indicated that the absence of adjustable seats in the Department's patrol cars was making patrol duty difficult for him. Mr. Gleason also expressed concern that the back problems he was experiencing might impair his ability to respond to emergencies, particularly those requiring use of force.[26] Sheriff McKenzie indicated that he shared the concerns that Mr. Gleason was expressing. Finally, Mr. Gleason advised Sheriff McKenzie that he had or would be consulting with an orthopedic surgeon, Dr. Gail M. Benson, about the possibility of obtaining surgical relief from his back problems.[27]

10. By mutual agreement between Mr. Gleason and Sheriff McKenzie in October 1993, the Murray County Sheriff's office relieved Mr. Gleason of patrol duty and, beginning November 1, 1993, called him to active duty only for training functions and transportation of prisoners. There was an understanding between the two of them that if Mr. Gleason would be able to obtain surgical or other treatment that relieved his back problems and if his doctor authorized a return to full duty status, Sheriff McKenzie would no longer limit him to transport duty and would restore him to patrol duty. From October 1993 to June 1995, Sheriff McKenzie also paid Mr. Gleason to attend peace officer training at County expense.[28]

11. There was a significant reduction in the active duty hours that the Sheriff's Department gave Mr. Gleason after he was limited to transport duty in October 1993. For the twelve-month period from November 1, 1992, through October 31, 1993, while Mr. Gleason was assigned both patrol and transport duty, the Sheriff's Department assigned him an average of 64.92 hours per month, resulting in an average income of $644.31 per month.[29] On the other hand, for the twenty-month period from November 1, 1993, through June 30, 1995, while Mr. Gleason was limited to transport duty, the Sheriff's Department assigned him an average of 13.14 hours per month, resulting in an average income of $141.00 per month. He earned a total of $2,820.03 from that employment. At no time during that period did Mr. Gleason request the Sheriff's Department to return him to patrol duty, nor did the Sheriff's Department require that he do so.

12. On December 17, 1993, Mr. Gleason was examined by Dr. Benson and underwent a discogram. At that time Mr. Gleason reported that he considered himself to be disabled and was "anxious to have some surgical procedure done to improve his current back situation."[30] Dr. Benson noted that his L4-5 disc was degenerated and painful and indicated that he could "return to light duty with no lifting over 10 pounds, no bending, twisting or prolonged sitting" until his next appointment.[31] Dr. Benson did not release Mr. Gleason to return to "full time LIGHT DUTY WORK" until July 7, 1994.[32]

13. On November 4, 1994, Dr. Benson examined Mr. Gleason and found:

> Darrell Gleason is having another spell of acute back pain that has been going on all week. He has marked loss of lumbar range of motion. Rigidity, also lordosis. Back pain on straight leg raising test. I would advise we try some home hanging pelvic traction and physical therapy modalities. Muscle relaxants and pain medications. Re-eval in 3-4 months.[33]

And when he saw Dr. Benson on June 22, 1995, he was experiencing "more symptoms in his right arm, numbness and tingling in his low back."[34]

14. While Mr. Gleason's assignments with the Sheriff's Office were being limited to transportation of prisoners, he made workers' compensation claims with Ken's Repair for both temporary partial and temporary total disability benefits and for payment for back fusion surgery to relieve his symptoms. Even though Mr. Gleason's back was symptomatic and Dr. Benson had placed some restrictions on his work activities, a workers' compensation judge found on September 15, 1995, that Mr. Gleason had neither a temporary total disability nor a temporary partial disability within the meaning of the Minnesota Workers' Compensation Act during the period from October 1, 1993, to July 14, 1995.[35] That judge also found that Mr. Gleason failed to meet his burden of showing that he needed immediate back fusion surgery to relieve the back problems that he was experiencing. Murray County was a party to that proceeding. On June 27, 1996, the Workers' Compensation Court of Appeals affirmed the former finding but vacated the latter.

15. During the period from November 1, 1993 through June 30, 1995, Sheriff McKenzie sought detailed information from Mr. Gleason's medical providers about the nature of his work restrictions.[36] On July 6, 1994, Dr. Benson indicated, among other things, that Mr. Gleason could perform light work full time but was restricted during an eight-hour work day from walking for more than one to four hours, from sitting for more than one to three hours, or from driving for more than three to five hours.[37] That opinion on work restrictions was transmitted to the Murray County Sheriff's Office.[38]

16. In June 1995 the Murray County Board recommended that Sheriff McKenzie stop assigning Mr. Gleason any further transport duties. The reason for the recommendation was that Mr. Gleason had a pending workers' compensation claim to which the County had been made a party. And the Commissioners were concerned that the County might incur liability if Mr. Gleason's injury were aggravated while transporting a prisoner.[39] Acting on that recommendation, Sheriff McKenzie informed Mr. Gleason that he no longer would be given any transport assignments.[40] Sheriff McKenzie stated that Mr. Gleason would remain on non-pay unless and until there was a successful outcome to the back fusion surgery that he was seeking. The Sheriff's decision was unilateral, and Mr. Gleason did not agree with that decision.[41]

17. With two minor exceptions, the Murray County Sheriff's Office gave Mr. Gleason no active duty assignments of any kind from the end of June 1995 until the date of the hearing in this matter. In November 1995 Mr. Gleason volunteered to act as first responder to a car-deer accident and three days later at the scene of a traffic death, and the Sheriff's office paid him for three hours work for those services.[42] The Sheriff's Department did, however, continue to pay Mr. Gleason to attend peace officer training at the County's expense from July 1995 through November 1998.[43] By mutual agreement between Sheriff McKenzie and Mr. Gleason, that training did not include use of force training because of concerns that such training might aggravate Mr. Gleason's back problems.[44]

18. On February 8, 1996, Dr. Benson examined Mr. Gleason and found that he continued "to be significantly symptomatic in his back" and that the symptoms appeared to be getting worse with time.[45]

19. On May 2, 1996, Dr. Benson indicated, among other things, that Mr. Benson could work as tolerated but was restricted during an eight-hour work day from walking for more than one to four hours, from sitting for more than one to three hours, or from driving for more than one to three hours.[46] Dr. Benson transmitted that opinion to the Murray County Sheriff's Office.[47] Later that month Sheriff McKenzie wrote a letter to Dr. Benson in which he enclosed a copy of the County's job description for deputy sheriffs, described aspects of the job, and asked Dr. Benson if Mr. Gleason was "released without limitation to perform the work described in the enclosed job description as supplemented by [his] letter."[48] On June 11, 1996, Dr. Benson replied by indicating that Mr. Gleason was "released to do regular work activities as tolerated."[49] Sheriff McKenzie also wished to know whether Mr. Gleason was then able to tolerate the work activities in his job description, but the Sheriff was unable to obtain an answer to that question.[50]

20. On August 7, 1996, it was Dr. Benson's opinion that Mr. Gleason could perform light work activity.[51]

21. By an order issued on June 6, 1997, a workers' compensation judge ruled that Ken's Repair and its insurer were obliged to pay for a surgical back fusion for Mr. Gleason. The judge also ruled that Mr. Gleason was entitled to receive temporary total disability benefits for the period from January 22, 1996 through March 31, 1996, and to receive temporary partial disability benefits for the period from April 1, 1996 through April 24, 1997.[52] Murray County was also a party to that proceeding. That decision was affirmed by the Workers' Compensation Court of Appeals on January 8, 1998.[53]

22. From January 22, 1996 through March 31, 1996, Mr. Gleason received ten weeks of workers' compensation temporary total disability benefits at an average of $386.12 per week. From April 1, 1996 through January 31, 1998, Mr. Gleason received 96 weeks of workers' compensation temporary partial disability benefits at an average of $253.54 per week. From February 16, 1998, through November 11, 1998, Mr. Gleason applied for and again received ten weeks of workers' compensation temporary total disability benefits at an average of $287.015 per week.[54]

23. From April 1, 1996 through January 31, 1998, Mr. Gleason earned minimum wage performing light duties at Ken's Repair, such as relieving the owner during breaks, ordering parts, doing paperwork, and answering telephone calls, for three hours a day, five days a week.[55]

24. In February 1998 back fusion surgery was performed on Mr. Gleason at McKennan Hospital in Sioux Falls, South Dakota.[56]

25. On June 12, 1998, about four months after Mr. Gleason's surgery, Dr. Benson examined him and found he had "numbness on the lateral right anterior thigh. He has positive Tinel's over the lateral femoral cutaneous nerve on the rim of the pelvis and numbness over that distribution. It is my impression that he is developing some cicatrization of that nerve producing numbness. Symptomatic treatment is advised."[57]

26. In November 1998 Sheriff McKenzie was defeated for re-election, and his term of office ended on December 31st of that year.[58] Richard Kottom was elected Murray County Sheriff in Mr. McKenzie's place. The new Sheriff began his term of office on January 1, 1999.

27. From July 1, 1995 through November 30, 1998, Mr. Gleason was employed by the Sheriff's Department to participate in law enforcement training activities and in two cases to respond to emergencies for a total of 107.75 hours, or an average of 2.76 hours per month. He earned a total of $1,283.54 from that employment, or an average of $32.91 per month.

28. In March or April of 1999 Mr. Gleason had a conversation with Sheriff Kottom and Deputy Sheriff Dale Matthews. During the course of that conversation Mr. Gleason indicated that he was disappointed with the results of his back surgery, that he

was not certain that he could work as a deputy sheriff, and that he expected to retire in the fall of 1999.[59]

29. On April 26, 1999, the Murray County Attorney sent letter notification to Mr. Gleason that "the Murray County Sheriff intends to remove you from or terminate any status you have as a Murray County Deputy Sheriff."[60] That letter went on to provide:

> Under the Minnesota Veterans Preference Act, Minn. Stat. § 197.46, you are hereby notified you have the right to request a hearing on the reasonableness of this removal. In order to protect your right to this hearing, you must make a written request to the Murray County Sheriff Department within sixty (60) days from receipt of this notice. Failure to request a hearing within this sixty (60) day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement to your position.[61]

30. On June 16, 1999, Mr. Gleason served Sheriff Kottom with a request for a hearing under the Veterans Preference Act. The parties were subsequently unable to agree on the nature of the issues to be determined at such a hearing.[62] On October 26, 1999, Mr. Gleason filed a Petition for Relief with the Commissioner, and this contested case proceeding ensued.

31. Other than voluntarily agreeing to a limitation of his active duty assignments to transporting prisoners in October 1993, Mr. Gleason has never voluntarily relinquished a position with the Murray County Sheriff Department.[63]

32. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

33. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. Minnesota law[64] gives the Commissioner of Veterans Affairs and the Administrative Law Judge authority to consider the Veterans Preference Act[65] issues that have been raised in this contested case proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all of the law's substantive and procedural requirements.

3. The Department gave Mr. Gleason and the County proper and timely notice of the hearing in this matter.

4. Mr. Gleason is an honorably discharged "veteran" within the meaning of the VPA,[66] and he is entitled to all of the protections and benefits of that Act.

5. The County is a political subdivision of the state within the meaning of the VPA[67] and its personnel practices are therefore subject to the provisions of that Act.

6. Minnesota law[68] requires a public employer to give a veteran notice of the right to a hearing to establish incompetency or misconduct before taking any action to remove the veteran from his or her position.

7. Mr. Gleason did not resign his position as a Murray County Deputy Sheriff in October 1993. Rather, he voluntarily requested and accepted a demotion from patrol deputy to transport deputy then. That demotion reduced his wages and hours from an average of $644.31 per month to an average of $141.00 per month. A voluntary demotion is not a "removal" within the meaning of the VPA.[69] So the County was not then required to give him notice of a right to a hearing to establish incompetency or misconduct.

8. In June 1995 the County reduced Mr. Gleason's hours and wages again — this time from an average of $141.00 per month to an average of $32.91 per month through January 1998. That demotion was unilaterally imposed on him by the County and was therefore involuntary. An involuntary demotion is a "removal" within the meaning of the VPA.[70] The County did not at that time notify Mr. Gleason of his right to have a hearing to establish incompetency or misconduct nor of any other right under the VPA. And the County therefore violated Mr. Gleason's rights under the VPA in June 1995.

9. Because Mr. Gleason was a permanent part-time employee of the County, rather than a temporary part-time employee, he is not excluded from coverage under the VPA as an "occasional or temporary" worker.[71]

10. Mr. Gleason's claim against the County under the VPA is not barred by the doctrine of collateral estoppel.

11. Mr. Gleason's claim against the County under the VPA is not barred by the doctrine of laches.

12. Mr. Gleason is entitled to reinstatement to the position of transport deputy at the rate of pay of $141.00 per month beginning as of July 1, 1995, and continuing until the County has met all of the statutory requirements of the VPA.[72]

13. The County is entitled to offset the compensation that it paid Mr. Gleason between July 1, 1995 and June 30, 2000 — namely, $1,283.54 — against the back pay for which it is liable.

14. Mr. Gleason is therefore entitled to a back pay award of $7,176.46, through June 30, 2000, together with additional back pay at the rate of $141.00 per month beginning on July 1, 2000, until the statutory requirements of the VPA have been met. He is also entitled to interest from the time that each paycheck was due at the rate prescribed by Minn. Stat. § 334.01, subd. 1.[73]

15. The County is not entitled to offset any compensation that Mr. Gleason earned from Ken's Repair between April 1996 through January 1998 against the back pay for which it is liable.[74] Nor is it entitled to offset any workers' compensation temporary partial and temporary total disability benefits that Mr. Gleason received from Ken's Repair or its insurer from January 22, 1996 through November 11, 1998.[75]

16. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

17. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

## RECOMMENDATIONS

The Administrative Law Judge recommends:

(1) That the Commissioner reinstate the Petitioner, Darrell Gleason, to his former position as part-time transport deputy sheriff for Murray County effective July 1, 1995;

(2) That the Commissioner award back pay to Mr. Gleason at the rate of $141.00 per month from July 1, 1995 through June 30, 2000, together with interest from the time that each paycheck was due at the rate prescribed by law;

(3) That the Commissioner allow the County to offset against that back pay award the $1,283.54 that it paid to Mr. Gleason as compensation between July 1, 1995 and June 30, 2000; and

(4) That the Commissioner direct the County to continue paying Mr. Gleason as a transport deputy at the rate of $141.00 per month from July 1, 2000, until the County has met all of the statutory requirements of the VPA.

Dated this _____ day of August 2000.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (two tapes); No Transcript Prepared.

**NOTICE**

Under Minnesota law,[76] the Commissioner of Veterans Affairs is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

## MEMORANDUM

Minnesota law[77] permits an honorably discharged veteran, who believes that a public employer has violated his rights under the VPA, to petition the Commissioner of Veterans Affairs for relief. Mr. Gleason filed his Petition for Relief on October 26, 1999, and the Commissioner began this contested case proceeding by issuing a Notice of Petition and Order for Hearing on November 4, 1999.[78] The Notice scheduled the hearing in this matter for 9:30 a.m. on April 17, 1998, at the St. Louis County Veterans Service Office in Duluth, Minnesota.

Under Minnesota law,[79]

> [n]o person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, *shall be removed from such position or employment except for incompetency or misconduct shown after a hearing,* upon due notice, upon stated charges, in writing. [Emphasis supplied.]
>
> Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

The parties both agree that Mr. Gleason is an honorably discharged veteran who generally may be entitled to the protections of the VPA to the extent that they may be applicable to him. They also do not dispute that Mr. Gleason's employment with the County has now ended. The major dispute here revolves around *when* his employment ended. Mr. Gleason argues that the County effectively terminated his employment without proper Veterans Preference Act (VPA) notice in June 1995. On the other hand, the County argues either that Mr. Gleason voluntarily resigned or took an indefinite leave of absence in October 1993 or that the County unilaterally terminated his employment in April 1999 but with proper notice.

### I.

### Evidentiary Rulings

At the hearing the ALJ took under advisement a motion to strike Petitioner's Exhibit 10 and objections to the admissibility of Respondent's Exhibits J1 through J7. Exhibit 10 was a communication between Murray County's Attorney and Sheriff concerning Mr. Gleason. The County objected to its admission on the ground of attorney-client privilege. Mr. Gleason contends that the privilege was waived when the Sheriff voluntarily supplied it to Mr. Gleason. The ALJ finds it unnecessary to address

the issue of privilege, since a close inspection of the document reveals nothing in its contents that is relevant to the issues about which the ALJ must make recommendations in this proceeding. Similarly, the ALJ finds nothing relevant in Respondent's Exhibits Nos. J1 through J7. Accordingly, Petitioner's Exhibit 10 and Respondent's Exhibits Nos. J1 through J7 have all been excluded from the record in this proceeding.

## II.

## Mr. Gleason Voluntarily Accepted a Demotion to Light Duty Status in October 1993

The County first claims that Mr. Gleason resigned his position in October 1993. A deputy sheriff is an officer of the court and a public official.[80] A public official resigns when that official leaves his or her job while intending never to return to it. Proving that a public official resigned requires showing two things: first, an intent to voluntarily relinquish the position; and second, a contemporaneous act of relinquishment.[81] Also implicit in the test is that the official communicate the intent to relinquish to the appointing authority. Whether these elements exist in a particular case are questions of fact.[82] Finally, a reviewing tribunal should not be "concerned with the name and appearance of things but with the reality."[83]

The County's argument that Mr. Gleason resigned his deputy position is based on Mr. Gleason's use of the word "quit" on numerous occasions over the last seven years when referring to the status of his employment relationship with the Sheriff's Department in October 1993. In December 1993 he told his treating physician that "[h]e has had to give up law enforcement."[84] In 1993 he told a QRC that "his low back symptoms were so bad that he felt he could no longer perform the duties of a deputy sheriff safely."[85] A physician conducting an adverse medical examination in January 1995 reported that Mr. Gleason had "quit" his position as a deputy sheriff.[86] Moreover, Mr. Gleason used the word "quit" to describe how his employment relationship with the Sheriff's Department changed in October 1993 when he testified under oath at a deposition in a workers' compensation case,[87] at the workers' compensation hearing,[88] and at the hearing in this proceeding.[89] It is the County's position that these and other similar statements conclusively establish that Mr. Gleason had an intent to resign in October 1993.

On the other hand, Mr. Gleason denies ever having an intent to completely relinquish his position as a deputy. Rather, he testified that what he meant by using the word "quit" was that he wished to temporarily relinquish patrol duty but remain available for transport and other light duty.[90] But even accepting the County's view of the evidence that Mr. Gleason possessed an intent to resign his deputy sheriff position in October 1993, other essential elements of a resignation are missing here. First, there is no evidence in the record that he ever communicated any intent to resign to his employer. Former Sheriff McKenzie, former Chief Deputy Pope, and Deputy Matthew all testified unequivocally that Mr. Gleason never expressed *to them* any intent to quit his job as deputy. Nor was there any evidence that Mr. Gleason ever expressed such

an intent to anyone else in authority at the County. Making statements to a doctor or to an examining attorney months or years later that he quit his job as a deputy sheriff in October 1993 does not amount to a tender of his resignation to his appointing authority, the Sheriff, in October 1993.

Second and perhaps more important, even if Mr. Gleason did intend to resign in October 1993, that intent was unaccompanied by any contemporaneous act of relinquishment. In other words, he did not quit working for the Sheriff's Department at that time. In fact, he remained on the County payroll and continued to perform prisoner transport functions and to participate in paid training activities for the next twenty months.[91] Although he was no longer scheduled for transport duty after June 1995, he continued to participate in paid training activities until November 1998. In short, the evidence negates any act of relinquishment, much less one that was contemporaneous with an unequivocal intent to resign.

How, then, should one characterize what occurred between Mr. Gleason and the Sheriff's Department in October 1993? As an alternative theory, the County argues that Mr. Gleason voluntarily took an indefinite medical leave of absence in October 1993 because of recurring back problems. But the leave of absence theory simply does not square with the facts here. He did not absent himself from being a deputy then — that is, relinquish that position temporarily. Rather, his hours, and therefore his compensation, were reduced, and the scope of his work assignments was limited. As the Minnesota Supreme Court indicated in *Downing*, *supra*, one needs to look at the reality of what occurred. And what squares best with all of the evidence is a finding that in October 1993 Mr. Gleason voluntarily accepted a demotion from being a patrol deputy to the light duty position of transport deputy because of his recurring back problems. For purposes of the VPA's notice requirement, the term "removal" is considered to embrace a demotion when it is involuntary.[92] Demotions do include reductions of a veteran's hours and compensation.[93] In October 1993 Mr. Gleason indicated to Sheriff Gleason that an old back injury was giving him problems on patrol duty, particularly because the Department's patrol cars did not have adjustable seats. Mr. Gleason also expressed concern about whether he would be able to physically handle emergency situations that might arise on patrol, such as use of force. By mutual agreement, the Sheriff limited Mr. Gleason's duties to transportation of prisoners and participation in training activities. As a consequence, he voluntarily accepted a reduction of hours from an average of 64.92 hours per month to an average of 10.13 hours per month. And he accepted a reduction in compensation from an average of $644.31 per month to an average of $100.75 per month.[94] In other words, Mr. Gleason accepted a voluntary demotion. And because the demotion was voluntary it did not amount to a removal under the VPA.[95]

Finally, "absence from work because of illness may not be construed as an abandonment where the facts show the employee intended to return to work as soon as he was able."[96] Here, the evidence established that the parties intended that Mr. Gleason's demotion in October 1993 to light duty would be a temporary one. Both Mr. Gleason and Sheriff McKenzie testified that they hoped that the back surgery that Mr. Gleason was seeking would enable him to resume his duties as a patrol deputy.[97]

## III.

## Mr. Gleason Was Involuntarily Demoted in June 1995 from a Transport Deputy to Training Assignments Only

On the other hand, the evidence dealing with the employment action that the Sheriff's Department took involving Mr. Gleason in June 1995 was materially different. And the recollections of both Mr. Gleason and former Sheriff McKenzie were substantially in accord about what happened then. Mr. McKenzie testified that in June of 1995 the County Board recommended that he discontinue using Mr. Gleason even for prisoner transport assignments. The County Board's reasoning was that Mr. Gleason had a pending claim against Ken's Repair for workers' compensation benefits for a back injury. The Board was concerned that Mr. Gleason might aggravate that injury even while serving as a transport deputy and thereby expose the County to liability.[98] Acting on that recommendation Sheriff McKenzie simply told Mr. Gleason in June 1995 that the Department would no longer be using him for prisoner transports.[99] And after that the Department never again scheduled Mr. Gleason to transport prisoners.[100] It did, however, continue to pay him wages through November 1998 to participate in law enforcement training activities, and it also paid him on two occasions to respond to automobile accidents as a representative of the Department.[101] In short, Mr. Gleason experienced a further reduction of his hours and wages beginning in July 1995, but this time there was nothing voluntary about the reduction.

The June 1995 reduction cut Mr. Gleason's hours and wages to what could fairly be characterized as a minimal level. Thus, he argues that he was effectively discharged from his employment at that time. But the Department did keep him on the payroll, albeit in a limited capacity, for another three and one-half years. So the ALJ concludes that a further demotion, rather than a discharge, is what actually occurred. But the distinction makes no difference for purposes of the VPA. Both are considered "removals." Although Sheriff McKenzie also regarded this second demotion as a temporary one in the hope that the back surgery would allow Mr. Gleason to return to full duty,[102] what distinguishes this second demotion from the first and brings it within the ambit of *Myers* was its involuntary nature. Sheriff McKenzie did not solicit Mr. Gleason's views about removing him from transport duty, nor did he give Mr. Gleason any choice about that. So what occurred in June 1995 was clearly a removal from the transport deputy position out of concern for Mr. Gleason's medical competency.[103] The VPA gave Mr. Gleason the right to a hearing on competency for that kind of removal, and the County was obligated to notify him of that right at the time he was removed. But Mr. Gleason was accorded neither the right nor the notice.

## IV.

## Mr. Gleason Was Neither a Temporary Nor an Occasional Worker for Purposes of the VPA

Citing *Crnkovich v. Independent School District No. 701*,[104] the County argues that Mr. Gleason was an occasional or temporary employee to whom the VPA does not apply. In *Crnkovich* the Minnesota Supreme Court affirmed a district court's finding that a veteran who had worked seasonally for a school district as a carpenter during four successive summers was an "occasional or temporary"[105] employee who was not covered by the VPA. In so ruling, the Court cited dicta in two of its earlier cases indicating that veterans were not covered by the VPA if their public employment was for a limited term and expired on a specified date.[106] In deciding *Crnkovich*, the Court also cited the following principle from 67 C.J.S. Officers 63 as forming the basis for Attorney General's opinions to the same effect:

> "Veterans" preference statutes do not apply to employments which are occasional or temporary, as where the services to be performed are of a general character and such as may be from time to time directed by a superior, without being in any manner indicated by the special nature of the employment. So an employment may be excluded from the protection of the statute where a daily wage is paid * * *.

But the Court stopped short of adopting that test as the rule of law in Minnesota. In the final analysis, the only exclusion of part-time public employees from coverage under the VPA that Minnesota's appellate courts have recognized to date is for veterans whose public employment is for a limited term and expires on a specified date, such as the seasonal employee in *Crnkovich*.

By arguing that the VPA does not cover any part-time public employee, the County suggests a broader test than the one that the courts have actually adopted. There is nothing in the case law that suggests that *permanent* part-time public employees are not covered by the Act. Here, the evidence established that Mr. Gleason was a permanent part-time County employee. His term of office was unlimited in duration and continued until some action was taken by the appointing authority to end it.[107] Although his job as a deputy sheriff was a part-time job and his work hours may have varied from month to month, he remained a *permanent* part-time employee of Murray County until that employment was actually terminated on April 26, 1999.[108] Mr. Gleason's employment as a deputy sheriff therefore does not meet the criteria established by the courts for exclusion from the VPA.[109]

## V.

## Mr. Gleason Is Not Barred by Collateral Estoppel or Laches

In its post-hearing memoranda, the County repeated a claim made in its earlier motion for summary disposition — namely, that application of the doctrine of collateral estoppel conclusively establishes that Mr. Gleason resigned his position as a deputy sheriff in October 1993. As was noted in the order denying summary disposition, collateral estoppel prevents identical parties or those in privity with them from relitigating identical issues in a subsequent, distinct proceeding.[110] In *Graham v. Special School Dist. No. 1,*[111] the Minnesota Supreme Court held that the doctrine of collateral estoppel may be applied in appropriate instances to agency decisions. In order for collateral estoppel to be applied to an agency decision, five factors must be met:

> (1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication; (2) the issue must have been necessary to the agency adjudication and properly before the agency; (3) the agency determination must be a final adjudication subject to judicial review; (4) the estopped party was a party or in privity with a party to the prior agency determination; and (5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issues.[112]

Collateral estoppel should not be rigidly applied.[113] As a flexible doctrine, the focus is on whether its application would work an injustice on the party against whom the estoppel is urged.[114] And both collateral estoppel and *res judicata* are qualified or rejected when their application would contravene an overriding public policy.[115]

In claiming collateral estoppel, the County relies on Finding No. 15 in a set of findings and an order issued by a workers' compensation judge in a proceeding that Mr. Gleason brought to recover workers' compensation benefits from Ken's Repair, namely, a finding that "[s]ince the employee resigned from the Murray County Sheriff Department, Murray County has not offered him *regular* part-time or full-time work."[116] [Emphasis supplied.] What the County omits to mention is that same finding goes on to include the following qualification:

> He has on occasion on an irregular basis performed an occasional day of work for Murray County consisting of either court appearances, putting on school programs, or transferring convicts between Minnesota, Iowa, and South Dakota.

So, in making that finding the workers' compensation judge clearly understood that Mr. Gleason was still maintaining some kind of continuing employment relationship with the Murray County Sheriff's Department. By using the term "resigned," the judge was only intending to communicate that Mr. Gleason was no longer employed as a full duty deputy sheriff. The compensation judge was clearly not intending to draw any legal conclusion about any continuing employment status that Mr. Gleason may have had with Murray County.

Collateral estoppel does not apply unless an issue has been actually litigated and decided.[117] In considering whether or not collateral estoppel applies here, the ALJ must determine whether or not the compensation judge's findings establish all of the elements that must be proved to show that a public official has resigned — namely, an intent to voluntarily relinquish the position, an act of relinquishment accompanying that intent.[118] Not only does the compensation judge's finding fail to establish any act of relinquishment on Mr. Gleason's part, her finding that some kind of employment relationship continued to exist between Mr. Gleason and the County tends to negate the existence of such an act. "There can be no estoppel where there is a reasonable doubt as to whether a fact was actually adjudicated."[119] Here, reasonable doubt does exist. So, the ALJ must conclude that the identity of issues factor required for application of collateral estoppel is not present in this case.[120]

The County also argues that any claim by Mr. Gleason for back pay is barred by the doctrine of laches. A veteran's right to file a petition for enforcement of the VPA is limited not by the equitable doctrine of laches but "by the six-year general statute of limitations for statute-based causes of action found at Minnesota Statutes section 541.01, subdivision 1 (2) * * * whether or not the employer gives the veteran the requisite notices."[121] Although Mr. Gleason argued in the alternative that he had been demoted in October 1993,[122] his Petition for Relief and main argument alleged that the County removed him from his employment in violation of the VPA in June 1995.[123] Since the ALJ has concluded that Mr. Gleason's October 1993 demotion to transport deputy was a voluntary one, no removal and, therefore, no violation of the VPA occurred then. So the statute of limitations does not come into play with respect to that claim. On the other hand, the ALJ has found merit in his second claim and that he was demoted again in June of 1995. Mr. Gleason's Petition for Relief was submitted on October 26, 1999, more than seven months before the statute of limitations on that second claim expired. So, the claim for relief that the ALJ has found to be meritorious is not time-barred.

## VI. Reinstatement, Back Pay, and Off-sets

### A. Mr. Gleason Is Entitled to Reinstatement to the Position of Transport Deputy as of July 1, 1995.

The evidence established that the reason why the Sheriff's Department involuntarily demoted Mr. Gleason from light duty transport deputy to even lighter duty in June 1995 was that it believed he was medically incompetent to perform his duties as a transport deputy. Although the County further demoted him for what it believed to be good cause, that is precisely a situation where the Veterans Preference Act requires a public employer to give a veteran the opportunity for a hearing on whether cause for the demotion or removal really exists. In *Myers v. City of Oakdale*,[124] the Minnesota Supreme Court held that physical inability to perform the duties of a peace officer constitutes "incompetence" within the meaning of the Veterans Preference Act.[125] And demoting a peace officer or terminating employment because he is physically or medically unable to perform his duties constitutes a "removal" that brings veterans

preference rights into play.[126] The legally appropriate course for the County in June 1995 would have been to give Mr. Gleason notice of his right to a hearing on whether he was then and would continue to be medically incompetent to perform the duties of a deputy sheriff and then to hold that hearing if he requested it.

But the inquiry here cannot end with the conclusion that the County violated Mr. Gleason's veterans preference rights. There remains the question of what should be done about it. Mr. Gleason has requested reinstatement to the position of patrol deputy, along with back pay to October 1, 1993. A veteran who is involuntarily demoted by a public employer without first receiving the written notice and hearing required by the VPA is entitled to reinstatement and back pay until he is formally discharged in accordance with the VPA.[127] And it is appropriate for an ALJ conducting a contested case proceeding under the VPA to make recommendations to the Commissioner about ordering reinstatement and back pay.[128] Mr. Gleason is requesting reinstatement to the position of patrol deputy that he had occupied on October 1, 1993. But the ALJ has concluded that Mr. Gleason's demotion from patrol deputy to transport deputy in October 1993 was a demotion that he actually requested and voluntarily accepted. He clearly is not entitled to a position that he voluntarily relinquished. Rather, Mr. Gleason's right to reinstatement only relates back to June 1995 when he was again demoted from transport deputy to what might be described as more limited stand-by and training status — that time against his wishes. And the position to which he should be reinstated should not be patrol deputy but rather transport deputy, the position that he had been occupying at his own request during the previous twenty months.[129]

### B. Mr. Gleason is Entitled to Back Pay, With Interest, as a Transport Deputy from July 1, 1995 to the Date of His VPA Competency Hearing.

Mr. Gleason is claiming back pay from October 1, 1993, and that claim is based on the average of 85.3 hours per month that he had been working as a patrol deputy prior to October 1, 1993.[130] But as indicated above, the ALJ has concluded that Mr. Gleason is only entitled to reinstatement as a transport deputy beginning on July 1, 1995. During the twenty months that he served as a transport deputy Mr. Gleason worked an average of 13.14 hours per month and earned an average of $141.00 per month.[131] The evidence is able to support no more than that monthly amount as a basis for a back pay award for the sixty (60) months that have elapsed from July 1, 1995, until the end of June 2000 when the ALJ conducted the hearing in this contested case proceeding. The appropriate starting point for a back pay award is therefore $8,460.00.[132] Mr. Gleason will also be entitled to future back pay at the rate of $141.00 per month from July 1, 2000, until such time as the County is able to properly discharge him for medical incompetency after a hearing or until his employment status changes in some other way. Moreover, Minnesota's appellate courts have held that a veteran who is entitled to back pay is also entitled to receive interest at the rate of six percent per annum calculated from the time each back paycheck was due.[133]

### C. The County Is Entitled to Some Off-Sets But Not For Any Workers' Compensation Benefits That Have Been Paid to Mr. Gleason.

Although Mr. Gleason's pay as a transport deputy from July 1, 1995 through June 30, 2000, would have amounted to $8,460.00, the County actually paid him a total of $1,283.54 for participating in law enforcement training activities and to respond in two instances to automobile accidents.[134] The County's back pay liability through June 30, 2000 must therefore be reduced to $7,176.46.

A back pay award is subject to damage mitigation issues usually applied to breach of employment contracts:[135]

> A veteran is required to "reduce his claim for wages by the amount which, by the exercise of due diligence, he could have earned in employment of a like kind or grade."[136]

There was evidence that from April 1996 through January 1998 Mr. Gleason worked about fifteen hours per week in a light duty position at Ken's Repair, earning the mininum wage for that employment.[137] In Petitioner's Memorandum[138] Mr. Gleason himself assumes that *Henry* requires him to offset his back pay award by the $7,416.00 that he earned from that other employment.[139] But the ALJ is unconvinced that *Henry* requires that offset of other income in this case because that employment at Ken's Repair would not have been precluded even if Mr. Gleason had continued working for the County as a transport deputy. From the outset he was only licensed as a part-time peace officer and was therefore restricted by law from working in that capacity for more than an average of 20 hours per week.[140] Prior to experiencing back problems in October 1993 he was only working an average of 85.3 hours per month as a deputy sheriff for Murray County[141] and was also working part-time as a mechanic at Ken's Repair. If he had never been further demoted from a light duty transport deputy in June 1995, there would have been nothing to prevent him from obtaining other income from working at a light duty position at Ken's Repair. Since the objective of the law is to place Mr. Gleason in the same position that he would have been in if he had not been further demoted in June 1995, the ALJ concludes that *Henry* does not require that Mr. Gleason's back pay award be offset by income that he could have earned at Ken's Repair even if the County had not further demoted him at that time.

The County also claims that it should receive an offset for workers' compensation benefits that Mr. Gleason received from Ken's Repair and its insurer from January 22, 1996 through November 11, 1998. From January 22, 1996 through March 31, 1996, Mr. Gleason received $3,861.21 in workers' compensation temporary total disability benefits. From April 1, 1996 through January 31, 1998, he received $24,339.93 in workers' compensation temporary partial disability benefits. Finally, for the period from February 16, 1998 through November 11, 1998, he applied for and again received workers' compensation temporary total disability benefits in the amount of $10,906.57.[142]

Awards of temporary partial and temporary total disability benefits are generally designed to compensate a worker for reduced earning capacity resulting from a work-related injury.[143] Where an injured worker has two separate jobs, a workers' compensation benefit award compensates for any lost earning capacity in both jobs and not just the job where the work-related injury occurred.[144] Here, the work-related injury that Mr. Gleason sustained at Ken's Repair also reduced his earning capacity as a deputy sheriff. It appears to the ALJ that the County would arguably be entitled to an offset to the back pay award only if it could establish two things by a preponderance of the evidence. First, the County would have to establish that the compensation judge allocated her benefit award between lost earning capacity as an automobile mechanic and lost earning capacity as a deputy sheriff. Second, it would have to establish that what was allocated to Mr. Gleason's earning capacity as a deputy sheriff was more than his actual earnings from January 22, 1996 through November 11, 1998 — i.e., an average of $32.91 per month. In that event, one might argue that the benefit award had already compensated him for part of what he will be receiving in back pay, and the County might be able to claim some kind of offset.[145]

But here, the compensation judge's awards were based on a finding that his earning capacity was no higher than his actual earnings from January 22, 1996 through November 11, 1998, the period when he was receiving benefits. Moreover, there is insufficient evidence in the record here to establish that the compensation judge made any allocation of his workers' compensation benefits between lost earning capacity as an automobile mechanic and lost earning capacity as a deputy sheriff. In fact, the limited evidence in the record argues against any allocation of workers' compensation benefits to lost earning capacity as a deputy sheriff and any corresponding offset to a back pay award. In a decision dated September 15, 1995, the compensation judge suggested that Mr. Gleason's limited earning capacity as a transport deputy was *de minimis*:

> He has on occasion on an irregular basis performed an occasional day of work for Murray County consisting of either court appearances, putting on school programs, or transferring convicts between Minnesota, Iowa, and South Dakota. The hours and pay involved in this work are irregular and sporadic.[146]

In other words, it appears that the compensation judge may not have compensated Mr. Gleason at all for lost earning capacity as a deputy sheriff.[147] In any event, the County has the burden of proving that it is entitled to offset some or all of the workers' compensation benefits that Mr. Gleason received against a back pay award.[148] And it failed in meeting that burden.

B. H. J.

[1] Minnesota Statutes, section 14.61 (1999). (Unless otherwise specified, citations to Minnesota Statutes refer to the 1999 edition.)

[2] Testimony of Darrell Gleason.

[3] Exhibit 1.

[4] Exhibit 4.

[5] Testimony of Ronald McKenzie.

[6] *Id*.

[7] Testimony of Darrell Gleason.

[8] *Id*.; Exhibit 5.

[9] *Id*.

[10] Exhibit L.

[11] Testimony of Brandt Pope.

[12] Exhibit 13. Mr. Gleason's current license expires on June 30, 2001.

[13] Minn. R. pt. 6700.07009, subp. 1G (1983).

[14] Testimony of Darrell Gleason.

[15] Testimony of Darrell Gleason.

[16] Testimony of Darrell Gleason and Ronald McKenzie; Exhibit 2.

[17] Testimony of Brandt Pope and Darrell Gleason.

[18] Minn. Stat. § 626.84, subd. 1 (c) (1982), currently codified as Minn. Stat. § 626.84, subd. 1 (f).

[19] Testimony of Darrell Gleason; *see also* Exhibit K.

[20] During the time he was employed as a part-time deputy sheriff in Murray County, Mr. Gleason also worked occasionally as a part-time police officer in the cities of Westbrook and Fulda. But he indicated a preference for working as a deputy because the pay was better. (Testimony of Darrell Gleason.)

[21] Testimony of Ronald McKenzie and Darrell Gleason.

[22] What the parties refer to as a "Road Deputy."

[23] What the parties refer to as a "Transport Deputy."

[24] Testimony of Ronald McKenzie and Darrell Gleason.

[25] Testimony of Ronald McKenzie.

[26] Testimony of Darrell Gleason, Brandt Pope, and Ronald McKenzie; *see also* Exhibit A at p. 6 and Exhibit O, Report of February 22, 1993 at p. 3.

[27] Testimony of Ronald McKenzie; *see also* Exhibit 5.

[28] Testimony or Ronald McKenzie; Exhibit K.

[29] Exhibit K.

[30] Exhibit 5.

[31] *Id*.

[32] *Id*.; *see also* Exhibit 6.

[33] Exhibit 5.

[34] *Id*.

[35] *See* Minnesota Statutes, § 176.101, subd. 2 and 5.

[36] Testimony of Ronald McKenzie.

[37] Exhibit 6.

[38] Exhibit 14, paragraph 13.

[39] Testimony of Ronald McKenzie; *see also* Exhibit 1.

[40] Testimony of Ronald McKenzie.

[41] *Id*.; testimony of Darrell Gleason.

[42] Testimony of Darrell Gleason; Exhibit K.

[43] Exhibit K.

[44] Testimony of Dale Matthews and Darrell Gleason.

[45] Exhibit 5.

[46] Exhibit 7.

[47] Exhibit 14, paragraph 17.

[48] Exhibit 8.

[49] Exhibit 9.

[50] Testimony of Ronald McKenzie.

[51] Exhibit 5.

[52] Exhibit C.

[53] Exhibit D.

[54] Exhibit L.

[55] Testimony of Darrell Gleason; Exhibit C at p. 3.

[56] Exhibit 14, paragraph 27.

[57] Exhibit 5.

[58] Testimony of Ronald McKenzie.

[59] Testimony of Dale Matthews and Darrell Gleason. (Mr. Gleason recalled making a statement to that effect in July of 1999.)

[60] Exhibit 12.

[61] *Id*.

[62] Petition for Relief at p. 3

[63] Testimony of Darrell Gleason, Ronald McKenzie, Brandt Pope, and Dale Matthews.

[64] Minnesota Statutes, section 14.50 and section 197.

[65] Minnesota Statutes, section 197.46.

[66] Minnesota Statutes, section 197.447 and section 197.46.

[67] Minnesota Statutes, section 197.46.

[68] *Id*.

[69] Minn. Stat. § 197.481. *Cf. Anderson v. City of Minneapolis*, 503 N.W.2d 780 (Minn. 1993).

[70] Minn. Stat. § 197.481. *See Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980).

[71] *See State ex rel. Lund v. City of Bemidji*, 295 N.W. 514, 516 (Minn. 1940) and *State ex rel. Castel v. Village of Chisholm*, 217 N.W. 681, 682 (Minn. 1928).

[72] *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 406 (Minn. App. 1987).

[73] *Id*.

[74] *See* Part VI-C of the Memorandum that follows.

[75] *Id.*

[76] Minnesota Statutes, section 14.62, subdivision 1.

[77] Minnesota Statutes, section 197.481.

[78] *See* Minnesota Statutes, sections 14.57 through 14.62 and section 197.481, subdivision 4.

[79] *Id*.

[80] *Zillgitt v. Goodhue County Board of Commissioners*, 202 N.W.2d 378 (Minn. 1972).

[81] *State ex rel. Young v. Ladeen*, 116 N.W. 486, 487 (Minn. 1908); *Byrne v. City of St. Paul*, 163 N.W. 162, 163 (Minn. 1917); *Hosford v. Board of Education of the City of Minneapolis*, 275 N.W. 81, 82 (Minn. 1937).

[82] *Id*.

[83] *Downing v. Independent School District No. 9, Itasca County*, 291 N.W. 613, 618 (Minn. 1940).

[84] Exhibit 5.

[85] Exhibit O.

[86] Exhibit P.

[87] Exhibit E at pp. 44-45.

[88] Exhibit F at pp. 49, 95, and 108.

[89] Testimony of Darrell Gleason.

[90] Testimony of Darrell Gleason.

[91] Exhibit K.

[92] *Leininger v. City of Bloomington*, *supra*.

[93] Although the Minnesota Supreme Court ultimately held that no demotion had occurred in either case, *State ex rel. Maki v. Village of Hibbing*, 14 N.W.2d 343 (Minn. 1944) and *Gorecki v. Ramsey County*, 437 N.W.2d 646 (Minn. 1989) clearly suggest that reductions of work hours and compensation are important indicators that suggest a demotion. Also, the ALJ notes that in unemployment law reducing an employee's work hours or wages represents a demotion that provides the employee with good cause to resign. See *Danielson v. Mobil, Inc.,* 394 N.W.2d 251, 253 (Minn. App. 1986) and *Cook v. Playworks*, 541 N.W.2d 366, 368-69 (Minn. App. 1996).

[94] Exhibit K.

[95] *Cf. Anderson v. City of Minneapolis*, *supra*.

[96] 62 C.J.S. *Municipal Corporations* § 732 (1949).

[97] *Myers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987), involved a medical leave of absence the public employer also characterized as temporary. But there, the medical leave was involuntary and therefore a "removal" under the VPA.

[98] Testimony of Ronald McKenzie.

[99] *Id*.

[100] *Id*.; testimony of Darrell Gleason; Exhibit K.

[101] *Id*.

[102] Former Sheriff McKenzie's testimony suggested that he still held out that hope. But more to the point, if he not also viewed the second demotion as temporary, there would have been no reason to keep Mr. Gleason on the Department payroll for any purpose.

[103] *See Myers v. City of Oakdale*, *supra*.

[104] 142 N.W.2d 284 (Minn. 1966).

[105] 142 N.W.2d at 286.

[106] *See State ex rel. Lund v. City of Bemidji*, 295 N.W. 514, 516 (Minn. 1940) and *State ex rel. Castel v. Village of Chisholm*, 217 N.W. 681, 682 (Minn. 1928). (In both cases the Court held that the veterans' public employment was for an unlimited and continuous term and that the predecessor to the current VPA applied.)

[107] Exhibit 4, Art. 16, § 3.

[108] The County's personnel procedures, which "apply to all Murray County employees except as specifically modified by a collective bargaining agreement" recognize that distinction. (Exhibit 4, Art. 2, § 2.1.)

[109] The ALJ also notes that the legislature has recognized the need for many smaller units of state government to employ part-time peace officers and has established a comprehensive scheme to license and regulate them. (*See* Minn. Stat. §§ 626.8461 through 626.8465.) Accepting the exclusionary test that the County has offered here would effectively result in a blanket exclusion of a large number of the state's peace officers from the VPA. The ALJ believes that a far more explicit expression of legislative or judicial intent than what the County has offered here is required to justify such a result.

[110] *Northwestern Nat'l Life Ins. Co. v. County of Hennepin*, 572 N.W.2d 51 (Minn. 1998).

[111] 472 N.W.2d 114 (Minn. 1991).

[112] *Id*. at 116.

[113] *AFSCME Council No. 14, Local Union No. 517 v. Washington County Bd. of Com'rs*, 527 N.W.2d 127 (Minn. App. 1995).

[114] *Johnson v. Consolidated Freightways, Inc.,* 420 N.W.2d 608, 613-14 (Minn. 1988).

[115] *AFSCME Council No. 96 v. Arrowhead Regional Corrections Bd*., 356 N.W.2d 295, 299 (Minn. 1984).

[116] Exhibit A, at p. 7.

[117] *Schlichte v. Kielan*, 599 N.W.2d 185, 188 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999).

[118] *See* Part II, *supra*.

[119] *Wolfson v. Northern States Management Co*., 22 N.W.2d 545, 548 (Minn. 1946).

[120] *See, Clapper v. Budget Oil*, 437 N.W.2d 722 (Minn. App. 1989), *review denied* (Minn. January 9, 1989).

[121] *Tharalson v. Hennepin Parks*, 551 N.W.2d 510, 512 (Minn.App. 1996).

[122] Petitioner's Post-Hearing Memorandum of Law (Petitioner's Memorandum) at pp. 8-9.

[123] *See* Petition for Relief at pp. 3-4 and Petitioner's Memorandum at pp. 10-12.

[124] 409 N.W.2d 848 (Minn. 1987).

[125] *Id*. at 851-52.

[126] Id. at 852-53.

[127] *Henry v. Metropolitan Waste Control Commission*, *supra*, 401 N.W.2d at 406.

[128] *Bolden v. Hennepin County Board of Commissioners*, 504 N.W.2d 276, 277-78 (Minn. App. 1993).

[129] There was no evidence that Mr. Gleason ever requested assignment back to patrol deputy at any time during the period from October 1993 to June 1995.

[130] Petitioner's Memorandum at pp. 18-20.

[131] *See* Finding of Fact No. 16 and Exhibits 11 and K.

[132] $141.00 x 60.

[133] *Henry v. Metropolitan Waste Commission*, *supra*, 401 N.W.2d at 406.

[134] *See* Finding of Fact No. 27 and Exhibits 11 and K.

[135] *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 406 (Minn. App. 1987).

[136] *Id*., quoting *Spurck v. Civil Service Board*, 42 N.W.2d 720, 727 (Minn. 1950).

[137] Finding of Fact No. 23; *see also* Exhibit C at p. 3.

[138] At p. 19.

[139] Under the ALJ's analysis, that would essentially wipe out his back pay award.

[140] *See* Minn. Stat. § 626.84, subd. 1(f) (1994).

[141] *See* Exhibit K. He was also working part-time as a peace officer in other jurisdictions but less than an average of 20 hours per week in the aggregate.

[142] Exhibit L.

[143] *See generally* Minn. Stat. § 176.101; *see also* Exhibit C at pp. 3 and 9; Exhibit D at p. 7.

[144] *Id*.

[145] If, for example, it could be shown that the compensation judge had erroneously established Mr. Gleason's earning capacity at $42.91 per month, the County might have an argument for a $10.00 per month offset. On the other hand, one could also argue that it was Ken's Repair that had a right to recover an overpayment of benefits.

[146] Exhibit A at p. 7.

[147] *In Behrens v. City of Fairmont*, 533 N.W.2d 854, 856 (Minn. 1995), the Minnesota Supreme Court held that temporary total compensation benefits were still awardable to claimants who were still able to secure "sporadic employment resulting in insubstantial income." The record here strongly suggests that the compensation judge considered the average of $32.91 per month that Mr. Gleason was receiving from the County to be in that category.

[148] *Henry v. Metropolitan Waste Control Commission*, *supra*, 401 N.W.2d at 406; *see also Spurck v. Civil Service Board*, *supra*, 42 N.W.2d at 727.